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To Kill a Migratory Bird: How Incidental Takes by Commercial Industry Activity Should Be Regulated by a New Civil Penalty Regime, Not the Current MBTA

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TO KILL A MIGRATORY BIRD: HOW INCIDENTAL TAKES BY COMMERCIAL INDUSTRY ACTIVITY SHOULD BE REGULATED BY A NEW CIVIL PENALTY REGIME, NOT THE CURRENT MBTA

Brittany E. Barbee*

Migratory birds are at odds with commercial industries in the United States. Industries are occasionally and accidentally killing migratory birds through their legal activity. Such actions against migratory birds are known as incidental takes. While the century-old Migratory Bird Treaty Act (MBTA) prohibits the taking of migratory birds, it is unclear as to whether it prohibits these modern-day incidental takes. The MBTA imposes criminal strict liability on those who violate its prohibitions, regardless of one's mental state at the time of the incident. Should the federal government hold commercial industries criminally liable for incidentally taking migratory birds through otherwise legal activity? This is the question Circuit Courts have faced and ardently tried to answer, creating a circuit split over the reach of the MBTA as applied to incidental takes.

This Article first argues that criminal strict liability must be rejected as it applies to incidental takes under the MBTA. Congress enacted the MBTA to protect migratory birds against takes by hunters and poachers, not unintentional takes by commercial industries. And no other federal regulation protecting migratory birds still utilizes criminal strict liability for incidental takes. Though the Fish and Wildlife Service (FWS) has suggested an incidental take program that would permit industries to take birds, industries without a permit would still be subject to prosecution under the MBTA. Presently, implementing such a program would be problematic and premature. In essence, it would be like trying to fit a square peg into a round hole.

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This Article then proposes a new civil penalty regime under the MBTA to account for the incidental takes by commercial industries. Such a provision would mirror every other federal migratory-bird regulation. Rather than prosecuting industries, a civil penalty regime will fine industries and deter them from incidental takes of migratory birds. Civil penalties will protect industries from overly harsh punishments and protect migratory birds by putting the fine monies in the Migratory Bird Conservation Fund. Applying the current MBTA to incidental takes is another attempt at trying to fit a square peg into a round hole. Judges and government agencies have tried every peg in the box. Now it is time for lawmakers to craft one that fits.

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INTRODUCTION

In 2002, Texas environmental inspectors made a surprise visit to a CITGO Petroleum oil refinery in Corpus Christi.[1] The inspection unveiled thirty-five migratory birds that were found dead in two large, uncovered tanks.[2] The birds included five white pelicans, four double-crested cormorants, and several duck species.[3] Inspectors assumed that the birds, found coated with oil, had simply landed in these large tanks[4] and were unable to escape.

The public outcry was substantial, as birds are seen as some of the most innocent and highly regarded creatures on the planet. They tend to keep to themselves, except for their chirping and singing. They are innately wired not only to travel annually between climate zones for suitable weather conditions but also to know exactly where they are going. And their beauty as a flock in flight is simply unparalleled.[5]

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[1] Purva Patel et al., *CITGO Indicted in Environmental Case: Oil Company Denies All Charges*, HOUS. CHRON., Aug. 10, 2006, at B4.

[2] Gloria Dickie, *Will the Migratory Bird Treaty Act Survive in the Modern Era? One of the Nation's Oldest Wildlife Laws Is Fighting for Its Life in the Courts*, HIGH COUNTRY NEWS (Oct. 26, 2015), http://www.hcn.org/issues/47.18/green-energys-dirty-secret/will-the-migratory-bird-treaty-act-survive-in-the-modern-era.

[3] *Id.*

[4] Patel et al., *supra* note 1.

[5] Victoria Gill, *Fly Like a Bird: The V Formation Finally Explained*, BBC NEWS, (Jan. 16 2014), http://www.bbc.com/news/science-environment-25736049 ("'V

Harper Lee played on this widely held sentiment for birds in her all-time classic *To Kill a Mockingbird*. When young characters Jem and Scout Finch are learning how to use their new air rifles, their father Atticus gives them one rule to follow.[6] In one of the most quoted lines of the book, he says, "[R]emember it's a sin to kill a mockingbird."[7] Little did Atticus know that it is also a federal offense.[8]

The Migratory Bird Treaty Act (MBTA) is a century-old federal regulation that protects migratory birds.[9] It currently covers over 1,000 bird species,[10] including nearly every bird species in the United States.[11] The MBTA makes it illegal to take, kill, or possess any of the listed birds without permission from the Fish and Wildlife Service (FWS).[12] Any violation of its provisions is labeled a crime, punishable by a fine, prison time, or both.[13] Regardless of whether a person intentionally shoots a migratory bird or a commercial

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formations are so beautiful,' said Adrian Thomas, professor of biomechanics at Oxford University.").

[6] Harper Lee, *To Kill a Mockingbird* 103 (50th Anniversary ed. 2010).

[7] *Id.*

[8] Migratory Bird Treaty Act, Ch. 128, § 2, 40 Stat. 755 (1918) (codified at 16 U.S.C. § 703 (2012)); 50 C.F.R. § 10.13 (2013) (listing the northern mockingbird as protected by federal law).

[9] 16 U.S.C. § 703(a) (2012).

[10] 50 C.F.R. § 10.13 (2013) (listing 1,026 species protected by the MBTA).

[11] JOHN C. MARTIN ET AL., THE MIGRATORY BIRD TREATY ACT: AN OVERVIEW 2 (2016) https://www.crowell.com/files/The-Migratory-Bird-Treaty-Act-An-Overview-Crowell-Moring.pdf ("FWS regulations include most native birds found in the Unites States as species protected by the MBTA, including species that do not migrate internationally and even species that do not migrate at all.") (citing 50 C.F.R. § 10.13 (2013)).

[12] 16 U.S.C. § 703(a) (2012) (listing nearly thirty prohibited acts including to take, kill, or possess); Meredith Blaydes Lilley & Jeremy Firestone, *Wind Power, Wildlife, and the Migratory Bird Treaty Act: A Way Forward*, 38 ENVTL. L. 1167, 1180 (2008) ("Section 704 of the MBTA confers permitting authority to the Secretary of the Interior, who has, in turn, delegated that authority to U.S. Fish and Wildlife Service.") (citing 16 U.S.C. § 704 (2012)).

[13] 16 U.S.C. § 707 (2012). The MBTA penalties differentiate by an offender's mental state. A felony requires a knowing mental state and carries a fine of $2,000 at most and imprisonment up to two years. A misdemeanor requires no mental state and carries a fine of $15,000 at most and imprisonment up to six months.

industry accidentally kills one in the process of its daily routine, the MBTA still imposes a criminal penalty with no *mens rea* requirement.[14]

But should the MBTA apply to those corporations that accidentally take or kill migratory birds while conducting legal activity? If not, how does humankind provide protection for migratory birds to keep them from extinction? If so, should offenders really be fined thousands of dollars and sent to prison when they had no intention of killing these birds?

Those thirty-five bird deaths in 2002 at the CITGO Petroleum refinery resulted in convictions under the MBTA at the federal district court level.[15] However, CITGO appealed the decision and had it reversed by the Fifth Circuit Court of Appeals.[16] In its decision, the Fifth Circuit held that the word "take" within the MBTA was limited to intentional acts done to migratory birds, not unintentional deaths of migratory birds resulting from commercial activity.[17]

The Fifth Circuit joined the Eighth and Ninth Circuits by holding that the MBTA does not apply to accidental effects of legal industry activity on migratory birds.[18] On the other side of the circuit split, the Second and Tenth Circuits have repeatedly held that the MBTA does in fact apply to such industry activity because it is a strict liability statute and because the industries were a proximate cause of the harm.[19] None of these Circuit decisions have been

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[14] 16 U.S.C. § 707(a) (2012) (describing the penalty provision labeling the misdemeanor charge as a strict liability offense).

[15] *United States v. CITGO Petroleum Corp.*, 893 F. Supp. 2d 841, 842 (S.D. Tex. 2012).

[16] *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 494 (5th Cir. 2015).

[17] *Id.*

[18] *Newton Cnty Wildlife Ass'n v. United States Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997); *United States v. Brigham Oil and Gas, L.P.*, 840 F. Supp. 2d 1202, 1208–09 (D.N.D. 2012).

[19] *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 689 (10th Cir. 2010); *United States v. FMC Corp.*, 572 F.2d 902, 907 (2nd Cir. 1978); U*nited States v. Moon Lake Electric Ass'n, Inc.*, 45 F.2d 1070, 1074 (D. Colo. 1999).

appealed to the Supreme Court,[20] which begs the question: how does the relationship between commercial industry and the MBTA move forward?

The FWS and many legal scholars have advocated for the implementation of an incidental take program for certain commercial industries under the MBTA.[21] While this program would allow those industries to escape criminal strict liability for unintentional takings, such incidents should not be subject to prosecution under the current MBTA in the first place. This paper proposes a different avenue to protect both migratory birds and commercial practice: a civil penalty regime for legal commercial industry activity.

Part I addresses the MBTA's place in the early history of migratory bird laws and the context in which the MBTA was written. It also discusses the structure of modern migratory bird laws and describes the state of bird laws today. Part II affirms the Fifth Circuit's interpretation of the word "take" and analyzes the intentional versus unintentional "take" distinction by examining the two sides of the circuit split. Part III argues for a rejection of the current criminal strict liability statute for legal commercial industry activity.

Part IV considers the FWS's proposed incidental take permit program. Though such a program would protect industries from being criminally liable, it poses multiple problems that would complicate matters and likely have an inadvertent effect on migratory birds and industries. Part V proposes a new civil penalty regime for

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[20] Kalyani Robbins, *Paved with Good Intentions: The Fate of Strict Liability Under the Migratory Bird Treaty Act*, 42 ENVTL. L. 579, 598 (2012).

[21] *Incidental Take: Migratory Bird Program Works on Programmatic EIS to Evaluate Options for Incidental Take Authorizations*, U.S. FISH & WILDLIFE SERV. (updated May 24, 2017), https://www.fws.gov/birds/policies-and-regulations/incidental-take.php [hereinafter *Migratory Bird Program*]; *see generally* Conrad A. Fjetland, *Possibilities for Expansion of the Migratory Bird Treaty Act for the Protection of Migratory Birds*, 40 NAT. RESOURCES J. 47 (2000); Krisztina Nadasdy, *Killing Two Birds with One Stone: How an Incidental Take Permit Program Under the MBTA Can Help Companies and Migratory Birds*, 41 B.C. ENVTL. AFF. L. REV. 167 (2014); Andrew G. Ogden, *Dying for a Solution: Incidental Taking Under the Migratory Bird Treaty Act*, 38 WM. & MARY ENVTL. L. & POL'Y REV. 1 (2013).

commercial industries under the MBTA. It then applies the current MBTA and proposed civil statute to two different scenarios. This application section will reveal the weak points in the current regulation and the compelling points in the proposed civil statute.

This proposed civil penalty regime under the MBTA will protect migratory birds by fining commercial industries for bird deaths and using those funds to recover that bird species. It will also guarantee to commercial industries protection from prosecution for accidentally killing birds in the course of legal activity.

I. THE MIGRATORY BIRD TREATY ACT (MBTA): A HISTORICAL OVERVIEW

The United States has enacted a significant amount of protective measures for migratory birds both internationally and domestically.[22] The protective measures are classified as primary and secondary authorities in order to designate the legal authority of each.[23] This section discusses only the primary federal authorities that were enacted to protect migratory birds and bird populations in the United States.[24]

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[22] *Laws/Legislation: A Guide to the Laws & Treaties of the United States for Protecting Migratory Birds*, U.S. FISH & WILDLIFE SERV. (updated Oct. 17, 2016), https://www.fws.gov/birds/policies-and-regulations/laws-legislations.php [hereinafter *Protecting Migratory Birds*]; *Migratory Birds & Habitat Program: What is a Migratory Bird?*, U.S. FISH & WILDLIFE SERV. (Oct. 28, 2015), https://www.fws.gov/pacific/migratorybirds/definition.html ("In regulation, a migratory bird is a bird of a species that belongs to a family or group of species present in the United States as well as Canada, Japan, Mexico, or Russia. Most native bird species (birds naturally occurring in the United States) belong to a protected family.").

[23] *Protecting Migratory Birds*, *supra* note 22 ("To help put the legal authorities into perspective, we have categorized them as primary and secondary authorities. Primary authorities are international conventions and major domestic laws that focus primarily on migratory birds and their habitats.").

[24] *Id.* (listing the primary federal authorities protecting migratory birds and bird populations as the Migratory Bird Treaty Act, Bald and Golden Eagle Protection Act, Endangered Species Act, other international treaties, and other domestic laws); *see also Other Relevant Laws*, U.S. FISH & WILDLIFE SERV. (Oct. 17, 2016), https://www.fws.gov/birds/policies-and-regulations/laws-legislations/other-

During the early 1900s, Congress passed a number of wildlife laws to protect birds from over-hunting and trade.[25] These regulations made certain actions against migratory birds illegal and created penalties for wrongdoers. Such penalties at first only included paying fines[26]; however, Congress amplified the penalties to paying fines and possibly serving jail time, regardless of the wrongdoer's mental state at the time of the crime.[27]

As time went on, Congress passed more wildlife laws to further protect migratory birds.[28] Though these regulations made certain actions illegal like those of earlier laws, they eventually began to incorporate both civil and criminal penalties for wrongdoers.[29] These penalties took into account one's mental state at the time of the crime, among other things.[30]

A. Migratory Bird Protection at the Turn of the Century

The 1800s brought forth an era of expansion in the United States, both in terms of the population and the frontier economy.[31]

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relevant-laws.php#otherLaws (listing the other domestic laws that are primary federal authorities protecting migratory birds and bird populations including the Lacey Act, Weeks-McLean Law, and Wild Bird Conservation Act).

[25] Lacey Act, Ch. 553, 31 Stat. 187 (1900) (codified as amended at 16 U.S.C. §§ 701, 3371-78 (2012)); Weeks-McLean Law, Ch. 145, 37 Stat. 828, 847 (1913) (codified at 16 U.S.C. §§ 847-48) (repealed 1918); Convention for the Protection of Migratory Birds, Gr. Brit—U.S., Aug. 16, 1916, 39 Stat. 1702 (codified at 16 U.S.C. § 703 (2012)) [hereinafter United States & Canada Convention]; Migratory Bird Treaty Act, Ch. 128, § 2, 40 Stat. 755 (1918) (codified as amended at 16 U.S.C. §§ 703–712 (2012)).

[26] Lacey Act, Ch. 553, 31 Stat. at 188 (1900).

[27] Weeks-McLean Law, Ch. 145, 37 Stat. at 848 (1913); Migratory Bird Treaty Act, Ch. 128, § 2, 40 Stat. 755 (1918).

[28] *See, e.g.,* Bald & Golden Eagle Protection Act, Ch. 278, 54 Stat. 250 (1940) (codified at 16 U.S.C. § 668 (2012)).

[29] Endangered Species Act of 1973, Pub. L. No. 93-205, § 11, Ch. 87 Stat. 884, 897-99 (1973) (codified at 16 U.S.C. §§ 1531–1544 (2012)); Wild Bird Conservation Act of 1992, Pub. L. No. 102-440, § 113, 106 Stat. 2224, 2231 (1992) (codified at 16 U.S.C. §§ 4901–4916 (2012)).

[30] *Id.*

[31] BRIAN CZECH & PAUL R. KRAUSMAN, THE ENDANGERED SPECIES ACT: HISTORY, CONSERVATION BIOLOGY, AND PUBLIC POLICY 8 (2011).

This led to a huge spike in commercial trade of animals as well as recreational hunting of animals.[32] Along the eastern coast, rural communities were quickly becoming urban; the market for hunting waterfowl was booming and unregulated; and a hunter's skill and the availability of game were the only limiting factors.[33] In the interior of the country, overhunting in undeveloped areas was wreaking havoc on many wildlife species, especially migratory birds.[34] Along the western frontier, railroads carried eager hunters to nesting grounds; railway cars were refrigerated to transport birds back to the eastern markets; and the newly developed telegraph transmitted news of specific locations with profitable nesting grounds.[35]

Therefore, the market for migratory birds was established. The effects of hunting and trading on bird populations were not monitored, as no bird conservation existed during that time.[36] This "unchecked overharvesting" of migratory bird populations led to their drastic decline.[37] Yet sportspersons continued to harvest birds to sell for profit, particularly for decorative clothing and for lavish meals served at upscale restaurants.[38] It took a so called "bird martyr" to bring awareness to the need for bird conservation reform.[39]

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[32] Lilley & Firestone, *supra* note 12, at 1176–77.

[33] DALE D. GOBLE & ERIC T. FREYFOGLE, WILDLIFE LAW CASES AND MATERIALS 769 (2010) (quoting GUY A. BALDASSARRE & ERIC G. BOLEN, WATERFOWL ECOLOGY AND MANAGEMENT 517–20 (1994)).

[34] CZECH & KRAUSMAN, *supra* note 31, at 10.

[35] GOBLE & FREYFOGLE, *supra* note 3, at 28.

[36] George Cameron Coggins & Sebastian T. Patti, *The Resurrection and Expansion of the Migratory Bird Treaty Act*, 50 U. COLO. L. REV. 165, 167–68 (1979).

[37] Lilley & Firestone, *supra* note 12, at 1176.

[38] Coggins & Patti, *supra* note 36, at 168 (crediting the decline in bird population to "demand for pies and fancy feathers" and the "right to blast away at any species affording food, profit, or sport"); DOUGLAS BRINKLEY, THE WILDERNESS WARRIOR: THEODORE ROOSEVELT AND THE CRUSADE FOR AMERICA 9–12 (2009) (noting that high-end female fashion called for exotic feathers to dress up hats, gowns, capes, and parasols).

[39] Ashley R. Fiest, *Defining the Wingspan of the Migratory Bird Treaty Act*, 47 AKRON L. REV. 587, 590 (2014) (citing Sandra A. Snodgrass, *It's for the Birds—*

The termination of the passenger pigeon embodied the destructive outcome that commercial hunting had on many bird populations.[40] When these birds migrated in due season, their numbers would be in the billions, and they would "darken the sky for many hours."[41] At one time this bird was even featured as the most abundant bird species on the planet.[42] After years of being hunted for sport or for its food value, however, the passenger pigeon was driven to extinction.[43]

1. The Lacey Act of 1900

The negative effects of exploiting migratory birds were now obvious and sank in for many Americans.[44] Bird conservationists across the nation sought protective measures by the federal and state governments.[45] Public outcries of concern eventually reached Congress and were put into action.[46] The Lacey Act was the initial try by Congress to put an end to the extreme carnage of bird populations.[47]

Recent Developments Under the Migratory Bird Treaty Act and Bold and Golden Eagle Protection Act, 2 ROCKY MNT. MIN. L. FOUND. PROC. 10A, 2 (2012)).

[40] JENNIFER PRICE, FLIGHT MAPS: ADVENTURES WITH NATURE IN MODERN AMERICA 5 (1999); Lilley & Firestone, *supra* note 11, at 1178 (noting other bird species driven to extinction such as the heath hen, golden plover, and Eskimo curlew).

[41] Lilley & Firestone, *supra* note 12, at 1177–78.

[42] EDWARD HOWE FORBUSH ET AL., A HISTORY OF THE GAME BIRDS, WILD-FOWL AND SHORE BIRDS OF MASSACHUSETTS AND ADJACENT STATES 433 (Wright and Potter 1912) ("Once the most abundant species, in flights and on its nesting grounds, ever known in any country, ranging over the great part of the continent of North America in innumerable hordes, the race seems to have disappeared within the past thirty years, leaving no trace.").

[43] Lilley & Firestone, *supra* note 12, at 1178.

[44] PRICE, *supra* note 40, at 5 ("[T]he extinction [of the passenger pigeon] finally persuaded many Americans that the continent's wildlife was finite and that much of it had been destroyed.").

[45] BRINKLEY, *supra* note 38, at 10–11.

[46] Lilley & Firestone, *supra* note 12, at 1178.

[47] *Id.*

The Lacey Act of 1900 was the first federal law protecting wildlife.[48] Its passage attempted to regulate animal commerce by making interstate transportation of illegally killed wildlife a violation.[49] A conviction of violating this act enforced a civil penalty, requiring an offender to "pay a fine."[50] Unfortunately, the Lacey Act proved ineffective at the time due to a lack of enforcement power as well as the emergence of a lucrative black market.[51]

2. Weeks-McLean Law of 1913

Then, Congress passed the Weeks-McLean Law of 1913.[52] This legislation attempted to federally regulate any birds that migrated from one state to another.[53] Unlike the Lacey Act, a conviction under this statute carried a misdemeanor criminal penalty, which dealt a fine or imprisonment or both.[54] States, however, had traditionally held authority over their own regulation of wildlife.[55] This led to a constitutional challenge by hunters who

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[48] Lacey Act, ch. 553, 31 Stat. 187 (1900) (current version at 16 U.S.C. §§ 3371–3378)

[49] *Id.*; Coggins & Patti, *supra* note 36, at 168.

[50] Lacey Act, ch. 553, 31 Stat. at 188 (listing penalties of paying fines upon conviction for "the shipper . . .; and the consignee knowingly receiving such articles so shipped . . .; and the carrier knowingly carrying or transporting the same").

[51] Lilley & Firestone, *supra* note 12, at 1178.

[52] Weeks-McLean Law, ch. 145, 37 Stat. 828, 847 (1913) (repealed 1918).

[53] *Id.* Its regulation declared:

> All . . . migratory game and insectivorous birds which in their northern and southern migrations pass through or do not remain permanently the entire year within the borders of any State or Territory, shall hereafter be deemed to be within the custody and protection of the Government of the United States, and shall not be destroyed or taken contrary to regulations hereinafter.

[54] *Id.* ("[A]ny person who shall violate any of the provisions or regulations of this law for the protection of migratory birds shall be guilty of a misdemeanor and shall be fined not more than $100 or imprisoned not more than ninety days, or both, in the discretion of the court.").

[55] Alexander K. Obrecht, *Migrating Towards an Incidental Take Permit Program: Overhauling the Migratory Bird Treaty Act to Comport with Modern Industrial Operations*, 54 NAT. RESOURCES J. 107, 112 (2014).

were now being prosecuted.[56] Their petitions centered around a Tenth Amendment claim that this regulation was outside the authority given to Congress and violated the United States Constitution.[57]

These challenges to the Weeks-McLean Law were heard in U.S. district courts, each holding the Weeks-McLean Law to be unconstitutional.[58] The government appealed to the Supreme Court, and was granted review; yet prior to the Court's decision, a possible solution to the issue was taking root.[59] Once Congress realized its authority over interstate commerce was failing to protect migratory birds, it decided to utilize its treaty powers.[60]

3. The Migratory Bird Treaty Act of 1918

In 1916, the United States entered into a treaty with Great Britain, acting on behalf of Canada at the time, to protect migratory birds traveling between the United States and Canada.61 Two years later, the Migratory Bird Treaty Act (MBTA) of 1918 was enacted by Congress and signed by President Woodrow Wilson.62 Of course, the constitutional grounds of the MBTA were challenged, but this time the courts held in favor of the government.63 Congress

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[56] *See, e.g.*, *United States v. McCullagh*, 221 F. 288, 290 (D. Kan. 1915); *United States v. Shauver*, 214 F. 154, 156 (E.D. Ark. 1914).
[57] Coggins & Patti, *supra* note 36, at 169;
[58] *McCullagh*, 221 F. at 295–96; *Shauver*, 221 F. at 160; Coggins & Patti, *supra* note 36, at 169.
[59] Coggins & Patti, *supra* note 36, at 169.
[60] Larry Martin Corcoran & Elinor Colbourn, *Shocked, Crushed and Poisoned: Criminal Enforcement in Non-Hunting Cases Under the Migratory Bird Treaties*, 77 DEN. U. L. REV. 359, 360–61 (1999).
[61] *See* Convention for the Protection of Migratory Birds, U.S.-Gr. Brit., Aug. 16, 1916, 39 Stat. 1702 (codified at 16 U.S.C. § 703 (2012)).
[62] *See* 16 U.S.C. §§ 703–711 (2012); Lilley & Firestone, *supra* note 11, at 1179.
[63] *Missouri v. Holland*, 252 U.S. 416, 435 (1920) ("Here a national interest of very nearly the first magnitude is involved… But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off…It is not sufficient to rely upon the States.").

had finally found a means to control the threat that unregulated hunting and poaching presented to migratory birds at the time.64

Eventually, the MBTA saw the United States treaty with Mexico, Japan, and Russia (formerly the Soviet Union).[65] Although each of these treaties differs somewhat in regard to its purposes and restrictions,[66] the overarching theme of each was to prohibit the taking of migratory birds.[67] The MBTA made it unlawful "except as permitted by regulations … to pursue, hunt, take, capture, [or] kill … any migratory bird … at any time, by any means or in any manner."[68]

Like the Weeks-McLean Law, a conviction under the MBTA delivered a misdemeanor criminal penalty, which dealt a fine, imprisonment, or both, regardless of an offender's mental state.[69] During the first several decades after the MBTA's enactment, criminal prosecutions concentrated on the hunting and poaching of migratory birds.[70] In fact, most people at that time interpreted the MBTA as a hunting law,[71] including the federal courts.[72]

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[64] Scott Finet, *Habitat Protection and the Migratory Bird Treaty Act*, 10 TUL. ENVTL. L.J. 1, 7–8 (1996).

[65] Convention for the Conservation of Migratory Birds and Their Environment, Nov. 26, 1976, 50 Stat. 1311, 29 U.S.T. 4647 (codified at 16 U.S.C. § 703 (2012)).

[66] Corcoran & Colbourn, *supra* note 60, at 362.

[67] Obrecht, *supra* note 54, at 114 (quoting 16 U.S.C. § 703(a)).

[68] 16 U.S.C. § 703 (2012).

[69] Migratory Bird Treaty Act, Ch. 128, § 6, 40 Stat. at 756 (1918) ("That any person, association, partnership, or corporation who shall violate any of the provisions of said convention or of this *Act*, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more that $500 or be imprisoned not more than six months, or both.").

[70] Corcoran & Colbourn, *supra* note 60, at 385; *see* Coggins & Patti, *supra* note 36, at 182–83 (discussing early MBTA cases based upon closing private lands based upon proximity to wildlife refuges, hunting and baiting violations, and selling migratory birds).

[71] Coggins & Patti, *supra* note 36, at 176 (explaining this belief was held for over fifty years after the passage of the MBTA).

[72] *United States v. Olson* 41 F. Supp. 433, 434 (W.D. Ky. 1941) ("The fundamental purpose [of this act is] the protection of migratory birds from destruction in an unequal contest between the hunter and the bird.").

B. Evolution of Migratory Bird Protection Laws

Congress continued to pass bird legislation that was statutorily similar penalty-wise for a few decades.[73] However, wildlife regulation in general evolved significantly from the first half of the twentieth century to the second half of the twentieth century. As time went on, lawmakers used less criminal strict liability and more of a criminal-civil combination in penalty provisions.

1. Bald and Golden Eagle Protection Act of 1940

The Bald and Golden Eagle Protection of Act (BGEPA) of 1940 initially extended safety to bald eagles.[74] It recognized both the symbolism of these birds as representing America and the threat of extinction facing them.[75] The BGEPA prohibited anyone from taking or selling bald eagles without permission.[76] Like the MBTA, a conviction under the BGEPA administered a criminal penalty, which dealt a fine or imprisonment or both regardless of an offender's mental state.[77]

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[73] *See* Migratory Bird Conservation Act, Pub. L. No. 70-770, Ch. 257, 45 Stat. 1222, 1225 (1929) (codified as amended at 16 U.S.C. § 715 (2012) ("[Whoever] shall violate or fail to comply with any of the provisions of this Act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined . . . or be imprisoned . . . or both."); Migratory Bird Hunting and Conservation Stamp Act, Pub. L. No. 73-124, Ch. 71, 48 Stat. 451, 452 (1934) (codified as amended at 16 U.S.C. § 718 (2012)) ("Any person who shall violate any provision of this Act or who shall violate or fail to comply with any regulation made pursuant thereto shall be subject to the penalties provided in [the MBTA].").

[74] Bald & Golden Eagle Protection Act, Pub. L. No. 76-567, Ch. 278, 54 Stat. 250 (1940) (codified at 16 U.S.C. § 668 (2012)).

[75] *Id.* ("no longer a mere bird of biological interest but a symbol of the American ideals of freedom . . . now threatened with extinction").

[76] *Id.* at 251 (making it illegal to "take, possess, sell, purchase, [or] barter . . . at any time or in any manner, any bald eagle").

[77] *Id.* (stating that whoever violates this act "shall be fined not more than $500 or imprisoned not more than six months, or both").

2. The Endangered Species Act of 1973

The Endangered Species Act (ESA) of 1973 provided protection to migratory bird species listed as threatened or endangered.[78] Unlike most of the early migratory bird laws previously mentioned, a conviction under the ESA delivered either a civil or criminal penalty.[79] The penalty was based upon an offender's mindset: civil penalty if knowing or without knowledge; and criminal penalty if willful.[80] This was the approach of more modern wildlife legislation.

3. Wild Bird Conservation Act of 1992

The Wild Bird Conservation Act (WBCA) of 1992 "promoted the conservation of exotic birds."[81] In order to do so, it prohibited importing certain bird species.[82] Like most modern wildlife legislation of this era, the WBCA differentiated between civil and criminal penalties based upon mental state.[83] In particular, it issued a civil penalty where no mental state was present for a

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[78] Endangered Species Act of 1973, Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified at 16 U.S.C. §§ 1531–1544 (2012)).
[79] *Id.* at § 11, 87 Stat. 897–98.
[80] *Id.* ("Any person who knowingly violates, or who knowingly commits an act in the course of a commercial activity which violates, any provision [of the ESA] may be assessed a civil penalty of not more than $10,000.") ("Any person who otherwise violates any provision of [the ESA] may be assessed a civil penalty of not more than $1,000.") (Any person who willfully commits an act which violates [the ESA] shall, upon conviction, be fined not more than $20,000 or imprisoned for not more than six months, or both.").
[81] Wild Bird Conservation Act of 1992, Pub. L. No. 102-440, 106 Stat. 2225 § 103 (1992).
[82] *Id.* at 2230 § 111.
[83] *Id.* at 2231 § 113.

violation.[84] And it designated either a civil or criminal penalty for a person who violated the WBCA with a knowing mental state.[85]

C. State of the Laws Today

Of the primary federal authorities that protect migratory birds, all but two of them now include both civil and criminal penalties based upon the offender's mental state.[86] The two authorities lacking this designation may actually be reduced to one authority because the one was repealed and replaced by the second.[87] And so, this solitary primary federal authority is the Migratory Bird Treaty Act, as it was never amended to include civil penalties along with its criminal penalties.[88] The paragraphs below provide the current state of each of the primary federal authorities that protect migratory birds.

First, the Lacey Act continues to be binding federal law and has been amended, among other things, to include banning illegal trafficking of certain plants.[89] Also, it now enforces both civil and criminal penalties, depending on the offender's mental state at the time of the incident.[90] The Lacey Act designates civil penalties for persons who violate its provisions with no mental state and for

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[84] *Id.* ("Any person who otherwise violates [the WBCA] may be assessed a civil penalty.").
[85] *Id.* ("Any person who knowingly violates [the WBCA] may be assessed a civil penalty.") ("Any person who knowingly violates [the WBCA] shall be fined . . . or imprisoned . . . or both.").
[86] *See generally* Lacey Act, 16 U.S.C. § 3373 (2012)); Weeks-McLean Law, Ch. 145, 37 Stat. 828, 847 (repealed 1918); Migratory Bird Treaty Act, 16 U.S.C. § 707 (2012); Bald & Golden Eagle Protection Act, 16 U.S.C. § 668 (2012); Endangered Species Act, 16 U.S.C. § 1540 (2012); Wild Bird Conservation Act, 16 U.S.C. § 4912 (2012).
[87] *Other Relevant Laws*, *supra* note 24 ("The Weeks-McLean Law rested on weak constitutional grounds, having been passed as a rider to an appropriation bill for the Department of Agriculture, and it was soon replaced by the [MBTA].").
[88] 16 U.S.C. § 707 (2012).
[89] 16 U.S.C. § 3372(a) (2012).
[90] 16 U.S.C. § 3373 (2012).

persons who knowingly violate a specific provision.[91] It designates criminal penalties for persons who knowingly violate every other provision of the statute.[92]

The second current authority is the MBTA, as it replaced the Weeks-McLean Law. Though the MBTA still retains only criminal penalties,[93] it has been amended multiple times over the course of its century-old existence.[94] As mentioned, it initially imposed a strict liability, misdemeanor crime for all violations.[95] A 1960 amendment made a distinction between certain crimes within the MBTA.[96] It created a felony crime for the violations of sale or take with intent to sell and reserved a misdemeanor crime for any other violation of the Act.[97] This amendment, however, still applied strict liability for both a felony and misdemeanor. Then, a 1986 amendment adjusted the felony provision to require a mental state, rather than continuing as strict liability.[98] It established the requirement of knowledge by the

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[91] 16 U.S.C. § 3373(a) (2012) ("Any person who engages in conduct prohibited by [this provision] and . . . should know that the fish or plants or wildlife were taken [or] possessed …, and any person who knowingly violates [this provision], may be assessed a civil penalty.") ("Any person who violates [this provision] may be assessed a civil penalty.").

[92] 16 U.S.C. § 3373(d) (2012) ("Any person who—knowingly imports or exports any fish or wildlife or plants in violation of [this provision], or violates [this provision] by knowingly engaging in conduct that involves the sale or purchase … knowing that the fish or wildlife or plants were taken [or] possessed . . . in violation of [this provision] shall be fined . . . or imprisoned . . . or both.") ("Any person who knowingly engages in conduct prohibited by [this provision] . . . and should know that the fish or plants or wildlife were taken [or] possessed . . . in an unlawful manner … shall be fined … or imprisoned … or both.") ("Any person who knowingly violates [this provision] shall be fined … imprisoned … or both.").

[93] 16 U.S.C. § 707 (2012).

[94] *See* Kristina Rozan, *Detailed Discussion on the Migratory Bird Treaty Act*, ANIMAL LEGAL & HISTORICAL CENTER, 2014, at section C, "Important Amendments," https://www.animallaw.info/article/detailed-discussion-migratory-bird-treaty-act.

[95] Migratory Bird Treaty Act, 16 U.S.C. §§ 703–712 (2012).

[96] *See* Pub. L. No. 86-732, 74 Stat. 866 (1960) (codified at 16 U.S.C. § 707 (2012)).

[97] *Id.*

[98] Pub. L. No. 99-645, 100 Stat. 3582 (1986) (codified at 16 U.S.C. § 707 (2012)).

defendant to charge a take as a felony crime under the MBTA.[99] However, the misdemeanor provision was left untouched, requiring no mental state to charge a take as a misdemeanor crime.[100]

In its current state, the MBTA still punishes unknowing, unintentional takes as misdemeanor crimes.[101] These crimes carry a potential fine up to $15,000, prison time up to six months, or both the fine and prison time.[102] The MBTA currently protects over 1,000 species of migratory birds.[103] This includes nearly all native birds in the United States, meaning that millions or even billions of these birds are protected.[104]

Third, the BGEPA of 1940 was amended to include a civil-criminal contrast in penalties.[105] Now, civil penalties are given to those who have no mental state present upon taking or possessing a bald or golden eagle.[106] Criminal penalties are reserved under the BGEPA for an offender who has a knowing mental state or "wanton disregard for the consequences" when he or she takes or possesses a bald or golden eagle.[107]

It is worth noting that the BGEPA has recently given authority to the Secretary of the Interior, and in turn the FWS, to issue permits for incidentally taking its two protected species through otherwise legal

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[99] *Id.*

[100] *Id.*

[101] 16 U.S.C. § 707 (2012).

[102] *Id.*

[103] 50 C.F.R. § 10.13 (2013) (listing 1,026 species protected by the MBTA).

[104] *Coggins & Patti*, *supra* note 36 at 190 ("The MBTA now protects nearly all native birds in the country, of which there are millions if not billions, so there is no end to the possibilities for an arguable violation.").

[105] Pub. L. No. 92-535, 86 Stat. 1064 (1972) (inserting "knowingly, or with wanton disregard" to violation triggering a criminal penalty) (adding a civil penalty for any violation lacking a mental state) (codified at 16 U.S.C. § 668 (2012)).

[106] *Id.* (describing anyone who "without being permitted to do so … shall take [or] possess" a bald or golden eagle "may be assessed a civil penalty by the Secretary of not more than $5,000 for each such violation.").

[107] *Id.* (listing anyone who "without being permitted to do so . . . shall knowingly, or with wanton disregard for the consequences of his act take [or] possess" a bald or golden eagle "shall be fined not more than $5,000 or imprisoned not more than one year or both.").

activities.[108] The process involves multiple steps by the FWS as well as the applicant[109]; this program will be further discussed in Part III of this paper. So far, the FWS has only issued two such incidental-take permits under the BGEPA, both to wind energy industries.[110]

Fourth, the Endangered Species Act of 1973 (ESA), which was contains both civil and criminal penalties, still applies penalty classifications to violations based on mental state.[111] Civil penalties under the ESA are issued to those who take or possess protected species without a mental state[112] and to those who knowingly take or possess them.[113] Criminal penalties may also be dealt to those who knowingly take or possess protected species, but not to those without a mental state present.[114] The ESA does provide a permit program for incidental takes by legal commercial activity.[115] This program has been in place since the 1982 amendment to the ESA, requiring the completion of a conservation plan.[116]

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[108] Eagle Permits; Revisions to Regulations for Eagle Incidental Take and Take of Eagle Nests, 81 Fed. Reg. 91494 (Dec. 16, 2016) [hereinafter Eagle Permits] (amending 50 C.F.R. pts. 13 & 22); 16 U.S.C. § 1539(a) (2012).

[109] *Id.*

[110] Sarah Wells, *Second-Ever Eagle Programmatic Take Permit Soon to Be Granted for California Wild Energy Facility*, ENDANGERED SPECIES L. & POL'Y BLOG, (Nov. 4, 2016) http://www.endangeredspecieslawandpolicy.com/2016/11/articles/conservation/second-ever-eagle-programmatic-take-permit-soon-to-be-granted-for-california-wind-energy-facility/. Notice that these permits have only been issued to two renewable energy industries, rather than any other commercial industries.

[111] Endangered Species Act of 1973, Pub. L. No. 93-205, § 11, Ch. 87 Stat. 897-99 (1973) (codified at 16 U.S.C. § 1540 (2012));

[112] 16 U.S.C. § 1540(a) (2012) (explaining that anyone "who otherwise violates any provision . . . may be assessed a civil penalty.").

[113] *Id.* (explaining that anyone "who knowingly violates any provision . . . may be assessed a civil penalty.").

[114] *Id.* § 1540(b) (ensuring that anyone who knowingly violates any provision . . . shall, upon conviction, be fined . . . or imprisoned . . . or both.").

[115] *Id.* § 1539(a) (2012) (permitting the act "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.").

[116] Pub. L. No. 97-305, 96 Stat. 1411, 1422.

Lastly, the Wild Bird Conservation Act of 1992 continues to operate today as it did when enacted.[117] Lawmakers have not amended the penalty provisions of the WBCA.[118] It still gives a civil penalty for a violation where no mental state exists.[119] And it gives either a civil or criminal penalty for a violation knowingly committed.[120]

II. CIRCUIT SPLIT OVER MBTA LIABILITY FOR INCIDENTAL TAKES BY COMMERCIAL INDUSTRY

U.S. Circuit Courts of Appeal disagree as to whether a distinction exists between intentional and unintentional acts by commercial industry as they apply to taking migratory birds. The Supreme Court has yet to address the liability of commercial industry under the MBTA, leaving the roughly 100-year-old statute to speak for itself.[121] As a circuit split continues to grow, it is important to note how each side analyzes the statute as it relates to the unintentional taking of migratory birds by legal commercial activity.

A. *United States v. CITGO Petroleum Corporation* Decision

In 2015, the Fifth Circuit's reversal of CITGO's conviction staked its position in the ongoing circuit split over the MBTA. As mentioned, the split stems from the issue of whether the MBTA applies to unintentional bird deaths caused by industry activity. The

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[117] Wild Bird Conservation Act of 1992, Pub. L. No. 102-440, 106 Stat. 2224 § 101 (1992) (codified at 16 U.S.C. §§ 4901–4916 (2012)).
[118] *Id.* § 113, 106 Stat. at 2231 (codified at 16 U.S.C. § 4912).
[119] *Id.* ("Any person who otherwise violates [the WBCA] may be assessed a civil penalty.").
[120] *Id.* ("Any person who knowingly violates [the WBCA] may be assessed a civil penalty.") ("Any person who knowingly violates [the WBCA] shall be fined . . . or imprisoned . . . or both.").
[121] Robbins, *supra* note 20, at 598.

Court found persuasive Justice Scalia's interpretation of the word "take" as based on its application to animals:[122]

> As applied to wildlife, to 'take' is to 'reduce those animals, by killing or capturing, to human control.[123] One does not reduce an animal to human control accidentally or by omission; he does so affirmatively.[124]

The Court then explained how courts generally infer that lawmakers utilize the common law meaning of terms within statutes.[125] Building upon this, the Court held that the word "take" within the MBTA was limited to intentional acts done to migratory birds, not unintentional deaths of migratory birds resulting from commercial activity.[126] This decision followed the legislative intent for enacting the MBTA very closely.[127] Through its decision, the Fifth Circuit joined the Eighth and Ninth Circuits in finding that incidental takes are not punishable under the MBTA.

B. Intentional versus Unintentional Take Distinction Divides the Circuits

The circuit split over the MBTA hinges mainly on the interpretation and application of its take prohibition.[128] Are incidental

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[122] *CITGO Petroleum Corp.*, 801 F.3d at 489 (citing *Babbitt v. Sweet Home Chapter Cmtys for a Great Or.*, 515 U.S. 687, 717 (1995) (Scalia, J., dissenting) (saying "take" is "as old as law itself").

[123] *Id.* (citing *Babbitt v. Sweet Home Chapter Cmtys for a Great Or.*, 515 U.S. 687, 717 (1995) (Scalia, J., dissenting).

[124] *Id.*

[125] *Id.* (citing *United States v. Shabani*, 513 U.S. 10, 13 (1995) ("[A]bsent contrary indications . . . Congress intends to adopt the common law definition of statutory terms.")).

[126] *Id.* at 494.

[127] *See supra* Part I, Section A.

[128] Andrew L. Askew, *Environmental Law—Endangered Species: Interpreting the Migratory Bird Treaty Act and Its Prohibition Against the "Taking" of Protected Birds*, 88 N.D.L. REV. 843, 851–52 (2012) (highlighting "the most significant issue in MBTA case law" as whether its term take includes incidental takes)

takes included in the prohibition, or does it only ban takes that are a product of hunting and poaching? While each side of the split details its own interpretation of take, each also examines a handful of other factors.

1. Second and Tenth Circuits Hold That Unintentional Takes Do Apply to Commercial Activity

Courts must use a very broad lens to conclude that the MBTA applies to commercial activity's unintentional takings. Their analyses focus on four statutory distinctions. The first analysis contends that the MBTA is a strict criminal liability statute, applying to both intentional and unintentional conduct.[129] The second argument urges that the language of the statute is not unconstitutionally vague, as it does not promote arbitrary prosecution.[130]

Next, Courts argue that the statute contains an inherent limiting feature of legal causation, making liable only those who had reasonable foresight of a wrongful act.[131] Though this is a valid safeguard in many types of regulations, its application to incidental takes under the MBTA is a stretch. Not only does the statute lack any suggestion of foreseeability as a factor,[132] but most industries are fully aware of the potential threat they pose to migratory birds.[133] And finally, this side of the circuit split has determined that

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(citing KEVIN A. GAYNOR ET AL., AM. L. INST., RECENT DEVELOPMENTS UNDER THE MIGRATORY BIRD TREATY ACT 307, 310 (2012)).

[129] *United States v. Moon Lake Electric Ass'n, Inc.*, 45 F.2d 1070, 1074 (D. Colo. 1999); *United States v. FMC Corp.*, 572 F.2d 902, 907 (2d Cir. 1978).

[130] *United States v. Apollo Energies, Inc.*, 611 F.3d 679, 689 (10th Cir. 2010).

[131] *Moon Lake*, 45 F.2d at 1085; *see* BLACK'S LAW DICTIONARY 1225 (6th ed. 1990).

[132] 16 U.S.C. §§ 703–712 (2012) (lacking any mention of legal causation or foreseeability as a factor to consider).

[133] Coggins & Patti, *supra* note 36, at 192 (giving an example of a motor vehicle operator who is aware that his vehicle is a dangerous instrument, that he must pay attention when operating it, and that his lack of attention may cause the death of a bird). "In each instance there is some element of 'foreseeability,' at least in the general tort sense."

a corporation may be held liable for its act of operating dangerously, regardless if it knew its operation caused bird deaths or not.[134]

2. Fifth, Eighth, and Ninth Circuits Hold That Unintentional Takes Do Not Apply to Commercial Activity

On the other side of the split, Courts use a very narrow lens to conclude that the MBTA does not apply to commercial activity's unintentional takings. They agree that this regulation is directed at the hunting and poaching of migratory birds, not accidental taking and killing of them by twenty-first-century industry. In order to rule accordingly, the Courts find subtle variances within the statute that tighten its scope. Three of these are listed below.

First, the meaning of the word "take" within the statute indicates deliberate conduct directed at birds, not unintentional conduct through lawful activity.[135] Second, strict liability cannot be appropriately applied to conduct indirectly taking birds, as "it would stretch this 1918 statute far beyond the bounds of reason to construe it as an absolute criminal prohibition."[136] Lastly, an affirmative act that takes birds is necessary to provoke the strict liability statute, not an omission that does so in a roundabout way.[137]

III. ARGUMENT TO REJECT THE CURRENT CRIMINAL STRICT LIABILITY SYSTEM FOR INCIDENTAL TAKES BY LEGAL COMMERCIAL ACTIVITY

Continuing to explicate the language of the century-old MBTA is not the way forward, as it only leads to more disagreement over interpretation. It is like trying to fit a square peg into a round hole. Judges, attorneys, and legal scholars alike have tried every peg in the box. Now it is time for lawmakers to craft one that fits.

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[134] *FMC Corp.*, 572 F.2d at 907.
[135] *United States v. Brigham Oil and Gas, L.P.*, 840 F. Supp. 2d 1202, 1208–09 (D.N.D. 2012).
[136] *Newton Cnty Wildlife Ass'n v. United States Forest Serv.*, 113 F.3d 110, 115 (8th Cir. 1997)
[137] *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 494 (5th Cir. 2015).

The current MBTA must be amended to comport with modern-day environmental realities. And these realities do not favor "[o]pen-ended criminal liability."[138] Lawmakers could easily restructure its language to account for mental state. Yes, keep the criminal penalty regime for intentional acts committed against migratory birds by industries. But, scrap such regulation for those unintentional acts committed against the birds. Commercial industry activities should be regulated in a different way, as the criminal strict liability statute was never intended for those activities.

A. Criminal Strict Liability as Public Welfare Doctrine, Not Wildlife Welfare Doctrine

In the late 1800s, the use of public welfare doctrine opened the door to criminal strict liability regulation.[139] As the number of industries and factories in the country grew exponentially, so did the number of social regulations.[140] Lawmakers decided to regulate the new offenses of the industrial society by incorporating criminal punishments without considering intent.[141] The prior establishment in the English common law that "a crime required the concurrence of an evil-meaning mind with an evil-doing hand" began to fade into the background.[142] And public welfare offenses began to take center stage.[143]

State courts first introduced this doctrine by applying it to the selling of intoxicating liquor and punishing offenders without

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[138] Coggins & Patti, *supra* note 36, at 192. "[T]he statute can be read to impose sanctions whenever a protected bird dies or is harmed through a direct or indirect human agency. Because of the myriad of ways that people can injure birds, some wholly innocent and unknowing, and because criminal statutes must give a higher degree of notice, such open-ended reading is not tolerable."

[139] Kepten D. Carmichael, *State Criminal Liability for Environmental Violations: A Need for Judicial Restraint*, 71 IND. L.J. 729, 736 (1996).

[140] *Id.*

[141] *Id.*

[142] *Id.* ("From this movement emerged new regulatory measures that involved no moral delinquencies.").

[143] Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 68 (1933) (explaining these new offenses and what they were termed).

evidence of criminal intent.[144] Lawmakers then applied the public welfare doctrine to other activities that threatened the public's health and safety, such as the sales of food and drugs.[145] The first federal regulation that utilized the public welfare doctrine was the Federal Food and Drug Act (FFDA) of 1906.[146] It "was an exertion by Congress of its power to keep impure and adulterated food" out of the hands of American citizens.[147]

This legislative maneuver to enact the FFDA parallels that which eventually enacted the MBTA. Both occurred around the same time period,[148] portrayed creative products of Congress exerting its power,[149] and incorporated criminal strict liability in their penalty provisions.[150] The FFDA, however, protected consumers and the lives of people,[151] whereas the MBTA protected, and still protects, only the lives of migratory birds.[152] Though the MBTA does benefit the public by preserving migratory birds, lawmakers did not enact it to preserve human health and safety. How then can the MBTA function as a public welfare doctrine,

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[144] *Id.* at 64–66; *see, e.g., Commonwealth v. Boyton*, 84 Mass. 160 (1861) ("[I]f the defendant purposely sold the liquor, which was in fact intoxicating, he was bound at his peril to ascertain the nature of the article.")

[145] Sayre, *supra* note 143, at 73.

[146] Federal Food & Drug Act, Pub. L. No. 59-384, Ch. 3915, 33 Stat. 768 (1906) (repealed) (replaced by the Federal Food, Drug, & Cosmetic Act of 1938, Ch. 675, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301–399 (2012))); Carmichael, *supra* note 139, at 737.

[147] Carmichael, *supra* note 139, at 737 (quoting *United States v. Dotterweich*, 320 U.S. 277, 280 (1943)).

[148] *See* Federal Food & Drug Act, *supra* note 146 (listing the year of FFDA's enactment as 1906); *see also* Lacey Act, Weeks-McLean Law, United States & Canada Convention, & MBTA, *supra* note 25 (listing the years of early regulations aimed at protecting migratory birds as 1900, 1913, 1916, and 1918).

[149] Carmichael, *supra* note 139 and accompanying text; Corcoran & Colbourn, *supra* note 60 and accompanying text.

[150] Federal Food & Drug Act, 33 Stat. 768 (noting any person who violates any provision of the FFDA with "shall be guilty of a misdemeanor, and for such offense be fined . . . or imprisoned not exceeding one year, or both."); MBTA, *supra* note 69.

[151] Carmichael, *supra* note 139, at 737 ("The need to protect human lives and the health of consumers drove Congress to enact the [FFDA].").

[152] 16 U.S.C. § 703 (2012).

worthy of continuing as a criminal strict liability offense, when it does not directly protect the public?

The public welfare doctrine's incorporation as a criminal strict liability statute continues to serve an important role in protecting the public on many different levels. But its present-day implementation against acts that threaten migratory birds, not the public welfare, is improper. Just as threats to wildlife have evolved over the past century, so have the legislative tools available to Congress. An alternate means of redressing the accidental killings of migratory birds is the only way forward.

B. Issues Arising from Imposing Strict Liability Crime on Incidental Effects of Otherwise Legal Commercial Activity

The MBTA's use of criminal strict liability must be rejected as it applies to commercial activity. The original purpose of this regulation was to deter the killing of migratory birds by hunters and poachers who were intentionally profiting from those birds.[153] It was not written in a time of wind turbines and oil refineries. The use of criminal strict liability cannot deter the unintentional killing of these birds by commercial industries' legal activity.

Those who disagree may argue that the MBTA must be a criminal strict liability statute in order to protect migratory birds. Such a counterargument neglects to consider the MBTA's application to a bird species regardless of its population levels, its use of a yearly regulation adjustment, and its relationship with the Endangered Species Act (ESA).

The MBTA not only covers migratory bird species that reach low numbers in population size; it covers every migratory bird species regardless of its population size.154 Each year, officials will adjust the MBTA if needed to better align "with the perceived population level of the species" in order to evade any significant population declines.155 Most of the roughly 1,000 bird species

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[153] *See* Part I. Section A.

[154] Coggins & Patti, *supra* note 36, at 206.

[155] *Id.* ("A significant facet of the MBTA, seldom remarked, is that is serves to avoid severe population declines in the first instance by adjusting regulation

regulated through the Act are neither endangered nor threatened.156 If certain migratory bird species do become endangered, they will become protected under the ESA. This tiered system of coverage for birds should be used as a system that works together.157 A modified MBTA could furnish less punitive penalties for industries accidentally taking birds that are not endangered, and the ESA would give more punitive penalties for industries taking threatened and endangered birds.

Criminal charges and possible prison time through the current MBTA are not the proper way to regulate accidental bird deaths caused by commercial activity. For decades, legal scholars have tried earnestly to raise awareness of the danger in criminalizing such regulations.[158] Even the Supreme Court has suggested the importance of limiting the use of criminal strict liability offenses.[159] Certain violations do warrant criminal proceedings, but a blanket strict liability regime for wildlife laws leads to a plethora of problems.

Although a need to regulate such activity is present when it harms wildlife, it is nonsensical to prosecute an unintended bird-taking brought about by legal activity.[160] The purpose of this type of

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annually to comport better with the perceived population level of the species. In other words, the FWS need not wait until a species is facing extinction before taking affirmative action.").

[156] Environmental Conversation Online System, *Listed Species Summary*, U.S. FISH & WILDLIFE SERV., (Jan. 21, 2017) https://ecos.fws.gov/ecp0/reports/box-score-report (listing 101 U.S. birds as endangered or threatened species).

[157] Fjetland, *supra* note 20, at 49 ("The MBTA must be utilized in concert with other environmental regulations for protection of migratory birds . . . if we, as a nation, are to prevent the decline of the populations of many species of birds to precariously low levels.").

[158] Carmichael, *supra* note 139, at 737–38; "[This] group of offenses punishable without proof of any criminal intent must be sharply limited." Sayre, *supra* note 143, at 70.

[159] *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978) (indicating these offenses should only be allowed in "limited circumstances"); *Morissette v. United States*, 342 U.S. 246, 263 (1952).

[160] Coggins & Patti, *supra* note 36, at 192 ("It cuts against the grain in this country to send a man to jail for thoughtless but negligent conduct having what often is perceived as an unintentional and relatively minor consequence.").

regulation is to deter specific conduct regardless of one's mindset. Surely the writers of the MBTA did not intend to criminalize operators of modern-day industry if they accidentally take a migratory bird.

C. Bring the MBTA up to the Standard of All Other Wildlife Laws Protecting Birds

Upon facing uncertainty within a statute, a court may turn to the language of succeeding statutes that encompass similar items to settle the uncertainty.[161] "Where the intent of Congress is unclear, as in the MBTA's scienter requirement, the court may look at subsequent legislation and transpose the intent found therein to the proper legislation."[162] Standardizing the MBTA in this way enables the likely estimate as to what Congress intended and promotes consistency.[163]

Civil penalties are the proper way to regulate accidental bird deaths caused by industry activity. By restructuring the statute in this way, industries are deterred from unintentional consequences of their operations, rather than being punished for them.[164] This civil regulation offers both protection for companies operating responsibly and protection for at-risk migratory birds.

Updating the MBTA in this way would bring it up to modern-day standards of most federal wildlife laws.[165] All other

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[161] *See* M. Lanier Woodrum, *The Courts Take Flight: Scienter and the Migratory Bird Treaty Act*, 36 WASH. & LEE L. REV. 241, 245 n.36 (1979) (citing J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION, 346 (C. Sands ed. 1943)).

[162] *Id.*

[163] *Id.* ("Such a transposition not only gives effect to the probable intent of the legislature but also facilitates the establishment of a more uniform and logical system of laws.").

[164] *See* Lilley & Firestone, *supra* note 12, at 148 (suggesting that civil sanctions added to the MBTA would provide penalty options that better suit the less severe offenses).

[165] Andrew G. Ogden, *Dying for a Solution: Incidental Taking Under the Migratory Bird Treaty Act*, 38 WM. & MARY ENVTL. L. & POL'Y REV. 1, 48

migratory bird laws incorporate civil penalties as well as criminal penalties.[166] They also use *mens rea* as the deciding factor for these penalties.[167] All of them use civil penalties when no mental state exists;[168] some use both civil and criminal penalties for a showing of knowledge, depending on the incident[169]; and one uses only criminal penalties for a knowing mental state.[170] It is time for the MBTA to join these laws in both structure and standard.

D. Act versus Omission Analysis by the Fifth Circuit May Be Problematic

The act versus omission contrast, a factor in the Fifth Circuit's decision in *United States v. CITGO Petroleum Corp.*, may be problematic for a few reasons. The Court explained that the MBTA's ban on taking only prohibits intentional acts that directly kill migratory birds, not omissions that indirectly or accidentally kill them.[171] Yet the Court did not address a potential rebuttal that the idea of omitting to do something could in fact be a decision to act otherwise.[172] And the Court did not explain any type of potential duty of care that may be associated with an omission. Given a different perspective on the case at hand or given a completely different scenario, this reasoning may fall apart.

(2013) (listing changes in penalty provisions among other things as a way to align the MBTA "with other major and more 'modern' federal wildlife laws.").

[166] Lacey Act, 16 U.S.C. § 3373 (2012); BGEPA, 16 U.S.C. § 668 (2012); ESA, 16 U.S.C. § 1540 (2012); WBCA, 16 U.S.C. § 4912 (2012).

[167] *Id.*

[168] *Id.*

[169] Lacey Act, 16 U.S.C. § 3373 (2012); ESA, 16 U.S.C. § 1540 (2012); WBCA, 16 U.S.C. § 4912 (2012).

[170] BGEPA, 16 U.S.C. § 668 (2012).

[171] *United States v. CITGO Petroleum Corp.*, 801 F.3d 477, 494 (5th Cir. 2015).

[172] *United States v. FMC Corp.*, 572 F.2d 902, 907 (2nd Cir. 1978) (holding that FMC performed an affirmative act because it manufactured a toxic chemical); Coggins & Patti, *supra* note 36, at 189 ("[The Second Circuit] then held that an omission in the face of a duty to act is the equivalent of an action, and, in any event the manufacture of the pesticide is an affirmative act.").

In this case, the Court argued that CITGO's failure to place protective netting over an oil vat to keep birds out was an omission. Though strict liability crimes do not require *mens rea*, they do require an *actus reus*. And, because the Court classified CITGO's conduct as an omission, no *actus reus* is present to trigger liability. It could be argued, however, that CITGO's choosing not to use netting and continuing to operate an oil vat, without safety measures, was an act. As such, this conduct would be classified as *actus reus* and trigger the strict liability statute.

In another scenario, consider a flock of 3,000 snow geese that lands in a toxic lake in Montana.[173] The exposure to the toxins kills nearly all of the birds.[174] The Atlantic Ritchfield Company (ARCO) has control of the lake and may face charges under the MBTA.[175] Using the Fifth Circuit's reasoning, a court may find that ARCO is not liable because not adjusting toxicity of water levels or using protective instruments to keep the birds away was an omission. Using the alternate reasoning, a court may find that ARCO is liable because choosing not to use protective measures, while continuing to operate a lake at toxic levels, was the act that harmed the birds.

Most industry standards require some type of commitment to operate responsibly, particularly those that have the potential to harm the environment. To ignore a potential duty of care is a precarious path to take. Likewise, to categorize an industry's damaging behavior as an omission, and therefore not a punishable act, sets a dangerous precedent. Is the Court inadvertently allowing industries to sit back, not take protective measures, and see what happens?

As shown, this act versus omission analysis will likely lead to more court disputes with no solid answers. This quandary leaves much to interpretation, particularly whether it is the omission of

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[173] Jim Robbins, *Hordes of Geese Die on a Toxic Lake in Montana*, N.Y. TIMES (Dec. 12, 2016), https://www.nytimes.com/2016/12/12/science/snow-geese-deaths-montana.html.

[174] *Id.* (reporting the death of thousands of snow geese and the escape of only a small number of them).

[175] *Id.*

proper bird-safe standards or the act of allowing the potential harm that takes the migratory birds.

IV. PRECARIOUS NATURE OF FISH AND WILDLIFE SERVICE'S PROPOSED INCIDENTAL TAKE PROGRAM

The U.S. Fish and Wildlife Service (FWS) has recently proposed an incidental take program for commercial activity that unintentionally takes migratory birds.[176] Within the framework of the MBTA, the FWS does have the authority, via the Secretary of the Interior, to issue permits to individuals or entities to take migratory birds.[177] An incidental take program sounds reasonable, but presents a handful of concerns. The FWS must consider the effects of this proposal before moving forward with it.

The FWS has issued take permits for certain intentional activities prohibited under the MBTA.[178] For example, those have been granted for scientific and educational purposes.[179] The FWS has also granted a permit for Alaskan indigenous inhabitants to use parts of migratory birds "for their own nutritional and other essential needs."[180]

The FWS has not, however, executed an incidental take permit for migratory birds in the past. Lawmakers have allowed certain military training exercises to kill migratory birds free from penalties under the MBTA.[181] This lets the military incidentally take

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[176] *Migratory Bird Program*, *supra* note 21 ("[T]he U.S. Fish and Wildlife Service is pursuing a programmatic environmental impact statement (PEIS) to evaluate approaches for developing an authorization mechanism for the incidental take of migratory birds.").

[177] 16 U.S.C. § 704 (delegating authority to the Secretary of the Interior); Lilley & Firestone, *supra* note 12, at 1180.

[178] Lilley & Firestone, *supra* note 12, at 1180.

[179] 50 C.F.R. § 21.12 (2013).

[180] Fish and Wildlife Improvement Act of 1978, Pub. L. No. 95-616, 92 Stat. 3112 (1978) (codified at 16 U.S.C. § 712 (2012)).

[181] Bob Stump National Defense Authorization Act, Pub. L. No. 107-314, 116 Stat. 2458 (2002).

migratory birds during military operations related to combat.[182] Because Congress amended the MBTA to include this exemption, rather than the FWS granting a permit to do so, the proposed incidental take program is the first of its kind for migratory birds.

A. Vast Quantity of Bird Species to Regulate Leads to an Extensive Number of Commercial Industries to Monitor

One concern over an incidental take program under the MBTA is the incredibly large number of bird species to consider, and in turn, the number of industries affected.[183] Though such a program has been implemented for certain incidental takes of eagles under the BGEPA,[184] and of endangered or threatened birds under the ESA,[185] to create such a program for migratory birds would be of much larger magnitude. The BGEPA has issued only two incidental-take permits in its history, both to wind energy industries.[186] As opposed to covering two species like the BGEPA program,[187] or roughly 100 species like the ESA program,[188] an incidental take program for migratory birds would cover over 1,000 bird species that fly all over the country.[189] This means that extensively more commercial industries would apply for permits and require monitoring for compliance. This would place a monumental amount of work on the FWS to process and regulate the program.

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[182] *Id.* In particular, this MBTA amendment is an exemption for a "military readiness activity authorized by the Secretary of Defense or the secretary of the military department concerned."

[183] 50 C.F.R. § 10.13 (2013) (listing 1,026 species protected by the MBTA).

[184] Eagle Permits, *supra* note 108.

[185] 16 U.S.C. § 1539(a) (2012) (permitting the act "if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.").

[186] Wells, *supra* note 110.

[187] Eagle Permits, *supra* note 108.

[188] *Environmental Conversation Online System*, U.S. FISH & WILDLIFE SERV. (Oct. 15, 2015), https://ecos.fws.gov/ecp0/pub/SpeciesReport.do?groups=B&listingType=L&mapstatus=1 (listing twenty birds as endangered species and eighty-one birds as threatened species).

[189] 50 C.F.R. § 10.13.

B. Controversial Application and Development Process to Obtain an Incidental Take Permit

Another reason to rethink executing an incidental take program under the MBTA is the contentious process to actually acquire a permit. Congress first authorized the FWS to issue incidental take permits under the ESA in 1982,[190] which provides the structure for any other possible incidental take permit programs that follow.[191] In order to obtain a permit, applicants must create, implement, and acquire funding for a Habitat Conservation Plan (HCP),[192] which serves as a legal contract between the permit holder and the Secretary of the Interior.[193] Applicants must also complete a standard application form and, if required, both an implementation agreement and a National Environmental Policy Act (NEPA) analysis.[194]

1. Causes of Indefinite Delays for Implementation

The precedence set by the Fifth, Eighth, and Ninth Circuit Courts would undoubtedly delay the implementation of an incidental take program under the MBTA. This side of the circuit split has

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[190] Endangered Species Act, Pub. L. No. 97-305, 96 Stat. 1411, 1422 (codified at 16 U.S.C. § 1539(a) (2012)). Through the Secretary of the Interior, the FWS has the authority to issue incidental take permits.

[191] The only FWS authorized incidental take permit programs presently are under the ESA and the BGEPA. Likely, the proposed MBTA incidental take permit program would mirror the program under the ESA, just like the program under the BGEPA has done. Eagle Permits, *supra* note 108.

[192] *Endangered Species Permits: Habitat Conservation Plans (HCPs) and Incidental Take Permits*, U.S. FISH & WILDLIFE SERV. (updated Feb. 26, 2018), https://www.fws.gov/midwest/endangered/permits/hcp/index.html (requiring that the habitat conservation plan "minimizes and mitigates harm to the impacted species during the proposed project").

[193] *Id.*; *see* Donald C. Baur & Karen L. Donovan, *The No Surprises Policy: Contracts 101 Meet the Endangered Species Act*, 27 ENVTL. L. 767, 788–89 (1997).

[194] *Fact Sheet: Habitat Conservation Plans*, U.S. FISH & WILDLIFE SERV. (updated Apr. 14, 2015), https://www.fws.gov/midwest/endangered/permits/hcp/hcp_wofactsheet.html [hereinafter Fact Sheet: HCP].

arguably declared that the MBTA does not encompass incidental takes, which in turn leaves no authority to the FWS to introduce an incidental take permit. A lengthy legal battle would ensue. Until the Supreme Court or Congress provides obvious support of the incidental take program under the MBTA, the FWS cannot issue permits.

If the FWS does obtain the authority to implement the program, processing the application for incidental take permits will take a significant amount of time. The length of time varies on how complex the issues are and how complete the application documents are.[195] Also, the more species that will be affected by the incidental take permit, the longer it will take to process that application.[196] If the HCP reaches a certain level of complexity, it requires an environmental impact statement or an environmental assessment under the NEPA.[197] The FWS's target time for processing the HCPs that require an environmental impact statement is around one year.[198] And if the HCP causes public controversy, it may take even longer.[199]

2. Leaves Little Room for Scientific Guidance

Multiple studies question the ability of HCPs to effectively protect and recover species.[200] This lack of confidence stems partly from concern over the FWS and permit applicants lacking scientific

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[195] *Id.*

[196] *Id.* Because the MBTA covers so many bird species, permit applicants are likely to list any and all protected migratory birds that are known to fly through the area where the applicant's facility is located. This would significantly increase the processing time of the application for a permit.

[197] *Id.*

[198] *Id.* Less complex habitat conservation plans have a processing target time of three to six months, depending on the effects of a plan. It is important to note these are target times for processing, not actual times for processing.

[199] *Id.*

[200] Matthew E. Rahn et al., *Species Coverage in Multispecies Habitat Conservation Plans: Where's the Science?*, 56 BIOSCIENCE 613 (2006); REED F. NOSS ET AL., THE SCIENCE OF CONSERVATION PLANNING: HABITAT CONSERVATION UNDER THE ENDANGERED SPECIES ACT 49–51 (1997).

guidance when developing HCPs.[201] With no scientific guidance, HCPs could bind the parties into a contract that may not even be beneficial for the protected species.[202] Another concern is the uncertainty in an ever-changing environment, as it is virtually impossible for HCPs to consider all potential needs of species in the future.[203] And so, a binding contract between the FWS and permit holder may prevent any alterations within the contract if more information about a species or environment is made available.[204]

3. Leads to Arduous Amounts of Work by the FWS and Industry Applicants

The FWS and industry applicants alike will face a significant volume of work in order to implement an incidental take program. The parties must collaborate on ways that the industry can address and reduce the future negative effects of its legal activity on the species listed in its HCP.[205] The applicant's HCP must include the (a) impact that incidental takings will have on the species, (b) steps the permit applicant will take "to minimize and mitigate such impacts," (c) funding secured by the permit applicant to perform such steps, (d) alternate methods to incidental takings contemplated by the permit applicant, (e) reasons why the alternate methods were

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[201] Michael Lipske, *Giving Rare Creatures a Fighting Chance*, NAT'L WILDLIFE FED'N (June 1, 1998), http://www.nwf.org/news-and-magazines/national-wildlife/green-living/archives/%201998/giving-rare-creatures-a-fighting-chance.aspx.

[202] *Id.*

[203] Jessica Owley, *Keeping Track of Conservation*, 42 ECOLOGY L.Q. 79, 91 (2015); *see* Borja Jimenez-Alfaro et al., *Modeling the Potential Area of Occupancy at Fine Resolution May Reduce Uncertainty in Species Range Estimates*, 17 BIOLOGICAL CONSERVATION 190 (2012); JOHN COPELAND NAGLE & J.B. RUHL, THE LAW OF BIODIVERSITY AND ECOSYSTEM MANAGEMENT 295 (2002).

[204] Jessica Owley, *Property Constructs and Nature's Challenge to Perpetuity*, *in* ENVIRONMENTAL LAW AND CONTRASTING IDEAS OF NATURE: A CONSTRUCTIVIST APPROACH 64 (Keith Hirokawa ed., 2014).

[205] Fact Sheet: HCP, *supra* note 194.

not employed, and (f) any additional requirements deemed "necessary or appropriate" by the FWS.[206]

The FWS goes over the HCP extensively and will issue a permit if it finds that (a) "the taking will be incidental," (b) the applicant will do everything in its power to "minimize and mitigate" the taking's impact on the species, (c) the applicant is able to secure funding for the duration of the HCP, (d) the taking will not have a drastic effect on the species' survival and recovery, and (e) any additional requirements deemed necessary will be met.[207] Upon implementation, monitoring the industry includes periodic reporting of takes, surveys to keep the status of the species in the area, and progress reports on fulfilling HCP responsibilities.[208]

4. Requires Substantial Funding and Monitoring

A number of scholars are concerned that the funding and monitoring of HCPs are deficient,[209] as most successful conservation programs are extremely costly and thorough.[210] In particular, HCP permits last roughly fifty to one hundred years, which is longer than most other permits.[211] How does the FWS determine how much money will be needed to implement and enforce such a long-term project? With so much uncertainty over that span of time, it is incredibly difficult to estimate the cost of HCP implementation.[212]

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[206] Endangered Species Act, 16 U.S.C. § 1539(a)(2)(A).
[207] *Id.* § 1539(a)(2)(B); Fact Sheet: HCP, *supra* note 194.
[208] Fact Sheet: HCP, *supra* note 194.
[209] *See* Nagle & Ruhl, *supra* note 203, at 294–95; *see also* David E. Moser, *Habitat Conservation Plans Under the Endangered Species Act: The Legal Perspective*, 26 ENVTL. MGMT. S7, S11 (2000).
[210] David Farrier, *Conserving Biodiversity on Private Land: Incentives for Management or Compensation for Lost Expectations?*, 19 HARV. ENVTL. L. REV. 303, 324 (1995); Stephanie Stern, *Encouraging Conservation on Private Lands: A Behavioral Analysis of Financial Incentives*, 48 ARIZ. L. REV. 541, 547, 550 (2006) (acknowledging that the conservation requirements under the ESA have led to unexpected expenses).
[211] *Conservation Plans and Agreements*, U.S. FISH & WILDLIFE SERV., https://ecos.fws.gov/ecp0/conservationPlan/ (last visited Mar. 1, 2018).
[212] *See* Albert C. Lin, *Participants' Experiences with Habitat Conservation Plans and Suggestions for Streamlining the Process*, 23 ECOLOGY L.Q. 369, 403 (1996);

And, because of the extensive duration of the permit, monitoring and enforcing the HCP proves to be quite challenging.[213]

C. How Such a Program Would Be Met by the Circuit Split

The third concern over an incidental take program under the MBTA is how the circuit split would affect it. As mentioned, the split would certainly cause delay in implementation. If authorized, the program would allow industries to obtain a permit and continue operating without fear of criminal charges. Industries in jurisdictions where liability for unintentional bird takes exist would greet the program with open arms. However, industries in jurisdictions where no liability exists for unintentional bird takes would likely meet the program with hostility.

In order to operate legally, does an industry look to recent court holdings in its federal jurisdiction or to a new administrative regulation? For example, CITGO Petroleum, Corp., would be highly unlikely to apply for the incidental take program since it is protected by Fifth Circuit jurisprudence. So the FWS would have to decide either to not enforce the regulation against those companies or to press them legally under the MBTA.

D. Signal Given to Commercial Industries by a Permit, as Opposed to a Penalty

The final concern is the signal a permit program sends to industries. In essence, a permit to take migratory birds gives industries a pass regardless of whether they are acting responsibly. Scholars even argue that incidental take permits act as licenses to

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see also Owley, *supra* note 203, at 93 ("It is difficult to determine how much money will be necessary to implement and enforce the HCPs upon which permits rely.").

[213] Nagle & Ruhl, *supra* note 203, at 294; Patrick Parenteau, *Rearranging the Deck Chairs: Endangered Species Act Reforms in an Era of Mass Extinction*, 22 WM. & MARY ENVTL. L. & POL'Y REV. 227, 293 (1998).

kill species.[214] Plus, the ability of an incidental take program to account for a change in the mental state of a permit holder is unclear. For instance, what if an industry knowingly or purposefully takes a migratory bird? Does that industry's permit still protect it from prosecution?

Criminal penalties are certainly too harsh of a punishment for commercial actors. Granting permits, however, are arguably no punishment at all for actions that do bring negative consequences. Civil penalties fall between the two, offering a method of deterrence without criminalizing the behavior.

V. PROPOSED CIVIL PENALTY REGIME FOR INCIDENTAL TAKES BY COMMERCIAL INDUSTRY ACTIVITY

A new civil penalty regime under the MBTA for incidental takes by commercial actors is the way forward. Lawmakers have yet to modify the original MBTA to account for these concerns,[215] and now is the time. Migratory birds continue to fly,[216] and at times, are unintentionally taken by industry activity. Industries continue to operate and accidentally take migratory birds in the process. There is no way to fully stop such incidents from happening, so it only makes sense to regulate them in the most reasonable, responsible way.

A. Rationale for a Penalty System: Criminal versus Civil

Amending the MBTA to include civil penalties for such unintentional takes better aligns with the proper regulatory objective "to deter violations of environmental standards rather than to

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[214] *See* J.B. Ruhl, *How to Kill Endangered Species, Legally: The Nuts and Bolts of Endangered Species Act "HCP" Permits for Real Estate Development*, 5 ENVTL. L. 345 (1999); *see also* Fraser Shilling, *Do Habitat Conservation Plans Protect Endangered Species?*, 276 SCIENCE 1662 (1997).

[215] Fjetland, *supra* note 21, at 62.

[216] Coggins & Patti, *supra* note 36, at 166 ("Wild creatures respect neither political boundaries nor human commands.").

punish."[217] A civil penalty provides the better and more appropriate fit as a remedy in most cases.[218] It is the round peg for the round hole. This is the twenty-first-century approach most needed by commercial industry and migratory birds alike.

B. Shaping This MBTA Civil Penalty Regime

Lawmakers are more likely to adopt a modest approach to amending and improving the MBTA.[219] This approach would entail a mental state distinction in the types of penalties given, keeping criminal penalties for intentional violations and introducing civil penalties for unintentional violations. This approach would not, however, recommend modifying the MBTA to include a citizen suit provision. Such modification would of course promote extra conservation of migratory birds, but such changes are too sweeping to win the support of lawmakers.[220]

1. Modern Migratory Bird Laws as a Reference

As mentioned, all other primary federal authorities that protect migratory birds include civil penalties in their respective penalty provisions.[221] Each of these authorities imposes a civil penalty for a violation where no mental state exists.[222] The MBTA should be updated to include the same differentiation in its penalty provisions.

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[217] Daniel P. Selmi, *Enforcing Environmental Laws: A Look at the State Civil Penalty Statutes*, 19 LOY. L.A. L. REV. 1279, 1281 (1986) (citing ENVTL. PROT. AGENCY, STUDY OF LITERATURE CONCERNING THE ROLES OF PENALTIES IN REGULATORY ENFORCEMENT 4 (1985)).

[218] *See* Lilley & Firestone, *supra* note 12, at 148 ("In most cases, we presume that civil sanctions would be the most appropriate remedy.") (citing generally to Jeremy Firestone, *Enforcement of Pollution Laws and Regulations: An Analysis of Forum Choice*, 27 HARV. ENVTL. L. REV. 105 (2003)).

[219] Fjetland, *supra* note 21, at 63.

[220] *Id.*

[221] *See supra* notes 88–90 and accompanying text.

[222] *See supra* notes 166–69 and accompanying text.

A counterargument may be that the MBTA should then be amended with an incidental take program, since the BGEPA and ESA each have one. Though they do incorporate incidental take programs within their frameworks, the BGEPA and ESA first adopted a mental-state distinction in their penalties.[223] Only years later did the FWS consider an incidental take program for each of them.[224] But even so, considering an incidental take program under the MBTA is highly problematic for reasons already discussed.[225] Simply updating the MBTA to consider mental state in its penalty provisions is enough.

2. Arizona State Laws for Aquatic Invasive Species as a Model

State wildlife laws provide a great model for federal lawmakers to consider. For example, Arizona may bring criminal or civil penalties against a person who illegally takes wildlife.[226] Arizona's law specifically protecting aquatic invasive species is a great place to start.[227] The law states the following:

> Except as otherwise provided by this section, a person who violates this article is subject to a civil penalty of not more than five hundred dollars.[228]
>
> A person who knowingly violates [the aquatic invasive species prohibitions] is guilty of a class two misdemeanor. In addition, the commission or

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[223] *See* Eagle Permits *supra* note 108 (stating civil penalties for violations without a mental state were added to the BGEPA in 1972); *see also supra* note 114 (listing the ESA as being enacted in 1973 with civil penalties for violations without a mental state).

[224] *See* Eagle Permits, *supra* note 108 and accompanying text (indicating the FWS first authorized incidental take permits under the BGEPA in 2016); *see also* Endangered Species Act, *supra* note 190 and accompanying text (indicating the FWS first authorized incidental take permits under the ESA in 1982).

[225] *See supra* Part IV.

[226] Ariz. Rev. Stat. § 17-314 (LexisNexis 2010).

[227] *Id.* § 17-255.

[228] *Id.* § 17-255.03.

> any officer charged with enforcing this article if directed by the commission, may bring a civil action in the name of this state to recover damages and costs against a person who violates [the aquatic invasive species prohibitions]. Damages and costs recovered pursuant to this subsection shall be deposited in the game and fish fund.[229]
>
> This article does not create any express or implied private right of action and may be enforced only by this state.[230]

As seen above, this statute delivers criminal penalties against persons for knowing violations.[231] This *mens rea* requirement provides the clarity needed for both prosecutors and potential offenders, as they both strive to perform their jobs responsibly. Then, this Arizona statute delivers civil penalties for unknowing violations.[232] Such a provision is indicative of the influence of modern environmental laws; wildlife and human activity must find a way to coexist. Finally, Arizona's law protecting aquatic invasive species does not allow private rights of action.[233] By only granting enforcement of its provisions by the state, activist groups are dissuaded from impeding on investigations.

3. Proposed Civil Penalty Regime Under the MBTA

By transplanting this statutory structure into the MBTA for commercial industry, lawmakers would protect legal activity while also safeguarding migratory birds. Lawmakers could (1) enforce civil penalties for industries that incidentally take migratory birds, (2) save criminal penalties only for those most egregious incidents where industries knowingly take migratory birds, and (3) bar private rights of action against those industries.

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[229] *Id.*
[230] *Id.* § 17-255.04.
[231] *Id.* § 17-255.03.
[232] *Id.*
[233] *Id.* § 17-255.04.

This new civil penalty regime under the MBTA could mirror the following:

> Whoever shall violate this subsection by incidentally taking a listed migratory bird, if such taking is incidental to otherwise lawful activity, may be assessed a civil penalty.
>
> In addition, the Fish and Wildlife Services may bring a civil action to recover damages and costs against whoever violates this subchapter. Damages and costs recovered pursuant to this subsection shall be deposited in the Migratory Bird Conservation Fund.
>
> This provision does not create any implied private right of action and may only be enforced by the designated governing body.

C. Challenges to Consider in Order to Properly Establish This Civil Penalty Regime

As with any possible amendment to legislation, lawmakers must consider a few challenges in order to properly establish this civil penalty regime. Those challenges include the amount of each civil penalty, whether to incorporate punitive damages at some point, where that money goes, and what birds really need regulatory protection.

What is the proper amount for a civil penalty? Lawmakers must decide at what level fines become deterrent for commercial industries. It may be a few thousand dollars, or it may even be a few million dollars. Then, they must choose whether to impose fines per bird take or per incident of bird takes. Once these decisions are made, lawmakers may want to consider using a cap on the number of civil penalties issued to an industry for bird takes over the course of a set amount of time. If an industry exceeds that cap, it would pay a certain amount in punitive damages or face civil forfeiture.

Where does the money from a civil penalty go? Perhaps the most obvious place for it to go would be the Migratory Bird

Conservation Fund within the FWS, which is in charge of regulating the MBTA. The money could then be used for protecting bird habitats, developing better bird-safe standards, and partnering with commercial industries to bring awareness of twenty-first-century bird threats. Perhaps the FWS could even use the money to develop and fund an adequate incidental take program that could handle the magnitude of the MBTA.

What bird species really need the protection of the MBTA? Enforcement discretion may be applied to resolve which bird deaths actually affect the population of its species. While this approach would shield companies from paying large fines for deaths of bird species not in need of protection, it may also set a dangerous precedent for future bird deaths that would in turn affect that species' population.

D. Application of Current versus Proposed MBTA

With the ongoing circuit split over incidental takes under the MBTA, liability for commercial industries is undecided. Each industry must rely on prosecutorial discretion and consider on which side of the circuit split its jurisdiction falls. The proposed civil penalty regime under the MBTA presents a uniform federal system to regulate migratory bird takes stemming from commercial industry activity. By applying the current and proposed MBTA to identical scenarios, the benefits of adding the civil penalty regime are obvious.

1. United States v. CITGO Petroleum Corp.

In applying the current MBTA regulation to *CITGO Petroleum Corp.*, the Fifth Circuit held that CITGO was not liable under the MBTA's prohibition on migratory bird takes. While this decision prevented CITGO from having to pay thousands of dollars and serve time in prison for accidentally killing thirty-five migratory birds, it also had negative effects. This decision left migratory birds entirely unprotected, industries free to omit from practicing bird-safe standards, and no consequences whatsoever for killing birds.

If the Fifth Circuit had held that CITGO was liable, the outcome would not have been much better. CITGO would have been guilty of a misdemeanor, charged thousands of dollars, and sentenced to time in prison for accidentally killing thirty-five migratory birds. Though this decision would have protected migratory birds from commercial activity, it would have done so at the expense of penalizing every industry for the unintended taking of birds while operating responsibly or not. In keeping the MBTA as is, the liability of an industry depends solely upon the district in which the United States Circuit Court is located.

In applying the proposed civil penalty regime of the MBTA to *CITGO Petroleum, Corp.*, the outcome would be markedly different. Instead of the Fifth Circuit finding CITGO not liable under the MBTA, CITGO would have received a civil penalty for the bird deaths, paid the fine, and made corrections so as not to keep taking birds and paying fines. The outcome of the *CITGO* case would also be uniform as compared to outcomes of other Circuit Courts.

2. Bird Deaths in Butte, Montana

Next, consider the incident in Butte, Montana, where a toxic lake killed thousands of migratory birds.[234] If ARCO is prosecuted,[235] how would a federal district court decide the case? Similar to the application of the current MBTA to *CITGO Petroleum Corp.*, the outcome will depend upon the location of the incident. The court would likely rule according to the precedent set in its jurisdiction,[236] finding ARCO not liable under the current MBTA. Different from the *CITGO Petroleum Corp.* application, however, is that the toxic lake in Butte, Montana, took nearly 100 times the number of birds taken by CITGO's oil tanks.[237] The fact

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[234] *See* Robbins, *supra* note 173.

[235] *Id.* (identifying the Atlantic Ritchfield Company (ARCO) as the owner and operator of the lake).

[236] Montana is under the jurisdiction of the Ninth Circuit Court of Appeals, which has held that the MBTA prohibits only intentional takes of migratory birds.

[237] *See* Robbins, *supra* note 173 (noting 3,000 snow geese were taken); *see also* Dickie, *supra* note 2 (reporting 35 migratory birds were taken).

that courts could treat these two cases the same signals the MBTA's broken framework.

By applying the proposed civil penalty regime to the bird deaths in Butte, Montana, officials have a uniform system to impose civil fines upon ARCO. While being uniform, this type of penalty could also provide for an increased civil fine to account for the death of 3,000 migratory birds. Depending on how lawmakers craft its legislation, the civil penalty regime could also place a cap on the amount of the fine or consider civil forfeiture. Regardless, the outcome would be the same for all industries and migratory birds: protection for industries from prosecution and protection for migratory birds by deterring certain industry activity.

CONCLUSION

The MBTA ushered in an era of wildlife laws that first offered protection to migratory birds. As the first century of its existence comes to a close, lawmakers must acknowledge the MBTA's present state: a broken framework. Its criminal strict liability provision is wreaking havoc on migratory birds and commercial industries alike. The current MBTA either protects legal commercial industry activity, or it protects migratory birds. It cannot do both. As the second century of the MBTA's existence begins, lawmakers have the opportunity to incorporate a civil penalty regime to align the MBTA with modern-day wildlife laws and better serve the purpose of its regulation.

Atticus Finch gave Jem and Scout fair parameters in going after birds with their air rifles. So, too, must lawmakers provide fair parameters when it comes to incidental takes of migratory birds. By including a civil penalty regime for incidental takes, the MBTA will protect both migratory birds and commercial industries. The funds from the civil penalties may be used to help recover bird species and advocate bird-safe standards. It will also guarantee to commercial industries protection from prosecution for accidentally killing birds in the course of legal activity. A civil penalty for incidental takes is essentially the round peg for the round hole that will lead migratory bird protection into the twenty-first century.